

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 2nd day of August, two thousand and six.

PRESENT:

HON. BARRINGTON D. PARKER,
HON. REENA RAGGI,
HON. RICHARD C. WESLEY,
Circuit Judges.

Abdoulaye Balde, _____
_____*Petitioner,*

-v.-

No. 05-5329-ag
NAC

Alberto R. Gonzales, Attorney General,

Respondent.

FOR PETITIONER: Matthew J. Harris, Law Office of Eric A. Wuestman, New York,
New York.

FOR RESPONDENT: Amul R. Thapar, United States Attorney for the Eastern District of
Kentucky, Frances E. Catron, Assistant United States Attorney,
Lexington, Kentucky.

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of
Immigration Appeals (“BIA”), it is hereby ORDERED, ADJUDGED, AND DECREED that the
petition for review is DENIED.

Abdoulaye Balde, through counsel, petitions for review of the BIA’s decision affirming

1 Immigration Judge (“IJ”) William Van Wyke’s denial of his application for asylum, withholding
2 of removal, and CAT relief. We presume the parties’ familiarity with the underlying facts and
3 procedural history of the case.

4 Where, as here, the BIA does not expressly adopt the IJ’s decision, but closely tracks the
5 IJ’s reasoning in briefly affirming the IJ’s decision, the Court may consider both the IJ’s and the
6 BIA’s decisions for the sake of completeness, at least when doing so does not alter our result.
7 *Wangchuck v. DHS*, 448 F.3d 524, 528 (2d Cir. 2006).

8 Section 208(a)(1)(B) of the Immigration and Nationality Act (“INA”) precludes judicial
9 review of the IJ’s discretionary denial of the petitioner’s claim of asylum for failure to file the
10 application within the one-year limitation period without demonstrating the existence of either
11 changed circumstances materially affecting the applicant’s eligibility for asylum or extraordinary
12 circumstances relating to the delay in filing. 8 U.S.C. §1158(a)(3). Although this Court retains
13 jurisdiction, under 8 U.S.C. § 1252(a)(2)(D), to review constitutional claims and matters of
14 statutory or regulatory construction, *see Xiao Ji Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 153-
15 54 (2d Cir. 2006); *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 178-80 (2d Cir. 2006), petitioner
16 has raised no such issues in this case. The Court therefore lacks jurisdiction to review the denial
17 of petitioner’s asylum application. The Court also lacks jurisdiction to review Balde’s claim for
18 CAT relief because he did not raise this claim before the BIA, thus failing to exhaust his
19 remedies. *See* 8 U.S.C. 1252(d)(1); *Gill v. INS*, 420 F.3d 82, 86 (2d Cir. 2005).

20 While we lack jurisdiction to review the denial of the petitioner’s claim of asylum, we are
21 not deprived of jurisdiction to consider the petitioner’s remaining claim of withholding of removal
22 under the INA, 8 U.S.C. §1231(b)(3). In reviewing the agency’s denial of withholding, we review
23 the agency’s factual findings, including adverse credibility determinations, under the substantial
24 evidence standard, treating them as “conclusive unless any reasonable adjudicator would be

1 compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B); *see, e.g., Zhou Yun Zhang v.*
2 *INS*, 386 F.3d 66, 73 & n.7 (2d Cir. 2004). Nevertheless, “the fact that the [agency] has relied
3 primarily on credibility grounds in dismissing an asylum application cannot insulate the decision
4 from review.” *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004). An adverse
5 credibility determination must be based on “specific, cogent reasons” that “bear a legitimate
6 nexus” to the finding. *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003).

7 After reviewing the record, we are persuaded that the inconsistencies in the petitioner’s
8 testimony constituted substantial evidence supporting the IJ’s adverse credibility finding. *See*
9 *Zhang v. INS*, 386 F.3d 66, 77 (2d Cir. 2004). Because petitioner failed to present sufficient
10 credible evidence that he will face persecution upon his return to Guinea, there is no basis for
11 disturbing the IJ’s conclusion that the petitioner failed to establish a “clear probability” that he
12 will be persecuted if he were to return to Guinea and that he therefore failed to satisfy his burden
13 of proof for relief pursuant to withholding of removal. *INS v. Stevic*, 467 U.S. 407, 429-30
14 (1984).

15 For the foregoing reasons, the petition for review is DENIED. Having completed our
16 review, any stay of removal that the Court previously granted in this petition is VACATED, and
17 any pending motion for a stay of removal in this petition is DENIED as moot. Any pending
18 request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate
19 Procedure 34(a)(2), and Second Circuit Local Rule 34(d)(1).

20 FOR THE COURT:
21 Roseann B. MacKechnie, Clerk

22 By: _____
23 Oliva M. George, Deputy Clerk
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